



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-95-7

FACTS:

You are a member of a municipal Housing Board of Commissioners (Housing Board), appointed by the Governor. Your appointment was not subject to confirmation by the City Council. The Governor does not publicize gubernatorial appointee vacancies on local housing authorities in a newspaper or other periodical of general circulation. As a Commissioner, you are paid an annual stipend which does not exceed \$1800.

You are contemplating seeking election to the City Council. If elected, you would receive an annual salary of approximately \$7,500. You state that the City Council does vote to confirm the four Housing Authority Commissioners other than yourself.^{1/}

QUESTION:

Does G.L. c. 268A permit you to hold your compensated position as a member of the Housing Authority Board of Commissioners if you are elected to the City Council?

ANSWER:

No, unless you forego the \$1800 stipend for serving on the Housing Board.

DISCUSSION:

As a member of the Housing Board, you are a special municipal employee^{2/} for purposes of the conflict law. See G.L. c. 121B, §7. If you are elected as a City Councillor, you will be a regular municipal employee in that position.

Section 20 of the conflict law prohibits a municipal employee from having a direct or indirect financial interest in a contract made by the same municipality. The term “contract” in §20 includes any type or arrangement between two or more parties under which one undertakes certain obligations in consideration of the promises made by the other. Thus, we have previously concluded that the term “contract” includes employment arrangements, *EC-COI-84-91*; *In Re Doherty* (1982); *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987), and that §20 prohibits multiple office holding in the same city or town, unless an exemption applies. See *EC-COI-90-2*; *Commission Advisory No. 7 Multiple Office Holding at the Local Level*.

Since our decision in *EC-COI-82-46*, we have recognized that because an elected position is not contractual in nature, an elected official’s compensation is not received pursuant to a “contract”. Therefore, §20 does not prohibit you from holding your Housing Board position and also receiving compensation as a City Councillor. However, we must examine whether there is an exemption which permits a City Councillor to receive compensation as an appointed Housing Board member.

1. Section 20(b) exemption

As noted above, if you are elected as a City Councillor, you will be a regular municipal employee. You will have a prohibited financial interest in your compensated position as a Housing Board member, unless an exemption from §20 applies. Section 20(b) contains the only exemption generally available to regular municipal

employees. In order to qualify for that exemption, you must be able to meet all of the following conditions:

1. The second job must be with a completely independent agency, department or board. As a City Councillor you may not participate in or have official responsibility for any of the activities of the second agency, and the first agency must not regulate activities of the second agency;
2. the position is publicly advertised;
3. you file a statement disclosing the second job with the city or town clerk;
4. the second job will be performed outside of the normal working hours of the first position;
5. the services performed in the second job are not part of your duties in the first job;
6. you are not compensated in the second position for more than 500 hours per year;^{3/}
7. the head of the second agency, department or board, certifies that no employee of that agency is available to do this work as part of their regular duties; and
8. the city or town council, board of aldermen, or board of selectmen give their approval of this exemption from §20.

We note that you will not fulfill the second §20(b) requirement, namely, that your position as a Housing Board member was “publicly advertised.”^{4/}

Section 20(b) requires that the second contract be “made after public notice or where applicable, through competitive bidding.” The term “public notice” is not defined in the conflict law. However, we have previously interpreted this term to require advertisement of the position “in a newspaper of general circulation.” *EC-COI-87-24*. The public notice requirement is not satisfied where the selection process has been “based primarily on word-of-mouth.” *EC-COI-83-95*; *85-7* (Governor’s word-of-mouth request for candidates to sit on seven member board did not satisfy “public notice” requirement in §7(b), the state counterpart to §20(b)). Moreover, we have declined to waive the public notice requirement “upon a theory that public advertising would be impractical or not effective.” *EC-COI-87-24* (“It is not for the Commission to waive the public notice requirement or broaden its scope by interpretation. Any such change in law or policy must emanate from the General Court.”) The vacancy on the Housing Board which you filled was not publicly advertised. Thus, you will not qualify for the §20(b) exemption.

2. The Housing Authority Exemption

Section 20 also contains a so-called housing authority exemption. Specifically, the seventh paragraph of §20 provides in relevant part:

This section shall not prohibit an employee of a housing authority in a municipality from holding any elective office, other than the office of mayor, in such municipality nor in any way prohibit such employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such elected officer shall not, except as otherwise expressly provided, receive compensation for more than one office or position held in a municipality, but shall have the right to choose which compensation he shall receive; provided further that no such elected official may vote or act on any matter which is within the purview of the housing authority by which he is employed; and provided further that no such elected official shall be eligible for appointment to any such additional position while he is still serving in such elective office or for six months thereafter.

Here, we are asked to consider whether the seventh paragraph, which makes reference to an “employee” of a housing authority, also applies to a “member” of such authority. Based on the express language used and the discernible legislative history of this paragraph, we conclude that it does not.

In determining the scope of the housing authority exemption, we look first to the language used. *Massachusetts Community College Council MTA/NEA v. Labor Relations Comm’n*, 402 Mass. 352, 354 (1988). By its express terms, the exemption applies to an “employee” of an housing authority. We note that under Chapter 121B, a housing authority “shall be managed, controlled and governed by five members.” G.L. c. 121B, §5. The office of member is created “by a statute enacted by the Legislature in accordance with the broad power entrusted to the General Court to name and settle officers, Constitution, Part II, c. 1, § 1, art. 4, and the Legislature can determine qualifications for members of a housing authority, provide for their appointment or election, define their duties, fix their tenure, and designate the causes for and method to be followed in their removal.” *Collins v. Selectmen of Brookline*, 325 Mass. 562, 91 N.E. 2d 747, 749 (1950). Under G.L. c. 121B, §6, a member may be removed from office “because of inefficiency, neglect of duty or misconduct in office.” A housing authority may employ an executive director and “such other officers, agents and employees as it deems necessary or proper,” and may delegate to “one or more of its members, agents or employees such powers and duties as it deems necessary and proper for the carrying out of an action determined upon by it.” G.L. c. 121B, §7. Each member of a housing authority, “and any person who performs professional services for such an authority on a part-time, intermittent or consultant basis ... shall be considered a special municipal employee” for purposes of the conflict law. *Id.* Read together, these sections draw a clear distinction between members of a housing authority on the one hand, and housing authority employees on the other. That is, the terms are neither synonymous nor are they readily interchangeable.

Moreover, our examination of the evolution of the housing authority exemption further supports our conclusion that the exemption applies to employees but does not to apply to members of a housing authority. The housing authority exemption was inserted by St. 1987, c. 374, §2, approved October 5, 1987. That statute was enacted less than four months after our decision and order in *In re Paul T. Hickson*, 1987 SEC 296 (decided June 25, 1987). There we found that Hickson, an elected city councillor in the City of Westfield, had violated §20 by also serving as a compensated maintenance worker for the Westfield Housing Authority. We imposed a fine for that violation in part because we found the facts of *Hickson* to be nearly identical to those in *In re Kenneth R. Strong*, 1984 SEC 195.

What is now the housing authority exemption was originally proposed in House No. 4294 as an amendment to Chapter 39 of the General Laws. House No. 4294 contained a broad exemption which provided that “any elected municipal employee may serve as a paid employee of a local housing authority.” The General Court rejected that language, and in House No. 5896, amended §20 by inserting language taken verbatim from similar provisions in §20 regarding the application of the §20 restriction to town councillors and boards of selectmen. The exemption contained in House No. 5896 applied to “an employee of a housing authority.” Based on our review of its evolution, we conclude that the intent of the housing authority exemption was twofold. First, the exemption was crafted to address concerns raised by the *Hickson* and *Strong* decisions which applied to housing authority employees. Second, the exemption was intended to incorporate the restrictions applicable to members of boards of selectmen and town councillors relative to holding additional positions in a municipality. However, we discern no legislative intent to extend the scope of the exemption to include housing authority members.

Accordingly, we conclude that because you do not qualify for the §20(b) or the housing authority exemption, §20 of the conflict law will prohibit you from being a City Councillor and also receiving compensation as a member of the Housing Board. However, you may serve in both positions if, within 30 days of your receipt of this opinion, you notify the Housing Authority that you will forego the \$1800 stipend received for serving on the Housing Board.

DATE AUTHORIZED: May 10, 1995

⁴In a city, four members of a housing authority shall be appointed by the mayor subject to confirmation by the city council. G.L. c. 121B, §5.

²“Special municipal employee”, a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

³Approximately 9.5 hours per week.

⁴Because it is not necessary to our decision, we expressly decline to address whether the City Council’s confirmation of four of the Housing Board’s members constitutes the City Council’s “participat[ion] in or ... official responsibility for ... the activities of the” Housing Board.